No. 88-2100

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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1988

THOMAS JOSEPH DUFON, Petitioner

v.

STATE OF CALIFORNIA, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION ONE

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The Petitioner, Thomas Joseph DuFon respectfully submits this reply to the Brief in Opposition filed by Respondent in the above-entitled matter. Petitioner notes that the People have made certain statements of fact with which Petitioner disagrees.[1] Additionally, the facts set forth

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1. A complete statement of facts is contained in the Petition for Writ of Habeas Corpus, p. 10-30.

by the People are irrelevant to the issues before this Court.

ARGUMENT

I.

The California Court of Appeal's interpretation of the Javor decision is erroneous.

The People premise their opposition on a claim that the California Court of Appeal, "...determined the petitioner received fully competent representation." (Response to Petition for Writ of Certiorari, p. 14.) That is not correct. In fact, the lower court held that trial counsel was ineffective in dealing with semen data (Petition for Writ of Certiorari, pp. a41-a42), and never addressed the evidence in the trial record eliminating Petitioner as a possible donor in two of the cases (Mann and Ware). (Petition for Writ of Habeas Corpus, p. 99-100.)

The People argue that because the Javor decision was based on whether counsel was withheld, not wnether counsel was ineffective, it is "inapposite" for the issues presented by Petitioner. (See Javor v. United States, 724 F.2d 831 (9th Cir. 1984).) Counsel in Javor was present during trial but slept through portions of the proceedings.

The holding in Javor addresses a constructive denial of counsel. Petitioner was constructively denied counsel through serious mental impairment. It is precisely this issue on which Petitioner focuses. While the California Court of Appeal and Respondent attempt to focus attention on the concept of ineffective assistance of counsel, both have misinterpreted Petitioner's Sixth Amendment claim. Trial counsel in this case, as the result of brain damage, was the functional equivalent of Javor's sleeping lawyer. The reasoning of the Javor court logically applies to Petitioner's case.

II.

The California Court of Appeal determinations of law or of mixed fact and law are not entitled to deference in this Court.

The People argue that the California Court of Appeal's "...findings of facts and conclusions of law are entirely correct and should be accorded deference by this Court." In support of this position, respondent relies on Wainwright v. Goode, 464 U.S. 78 (1983), and 28 U.S.C. 2254(d). Respondent has misinterpreted those authorities. Deference may not be afforded state court determinations of purely legal questions

or mixed questions of law and fact. Fondler v. Goldsmith, 728 F.2d 1181, 1190-1191, fn. 21 (9th Cir. 1984).

The authorities cited by the People are all directed at federal court habeas corpus proceedings not certiorari. Reliance on 28 U.S.C. 2254(d) is therefore misplaced. That statute addresses the duty of federal judges to defer to state findings of fact in prior habeas corpus evidentiary hearings. Even if a similar standard is applied to review of the instant case, deference may not be afforded to state court legal findings. A federal judge may not defer to a state court's finding of law, it is the judge's duty to apply applicable federal law to state court fact findings independently. Meldenhall v. Hopper, 453 F.Supp. 977, 979, affd. 591 F.2d 1342 (D.C.Ga. 1978). These authorities simply restate prior holdings of this Court,

> Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judges duty to apply the applicable federal law to the state court fact findings independently. The state court conclusion of law may not be given binding weight on habeas.

Townsend v. Sain, 372 U.S. 293, 318 (1963). The California Court of Appeal's legal findings are not entitled to deference in this Court.

III.

Petitioner's delay in filing a Petition for Writ of Habeas Corpus was justified and has resulted in no prejudice to the People

The People again attack Petitioner and counsel for seeking to "benefit from his trial counsel's death." (Brief in Opposition, p. 13.) While Petitioner regrets having to address this issue before this honorable Court, the People's unfounded rhetoric cannot be ignored. Following the appeal in his case, from the summer of 1984-1986, Petitioner contacted ten legal organizations as specifically set forth in his Petition (Petition for Writ of Habeas Corpus, p. 4), and sent seventy letters requesting legal assistance (Petition for Writ of Habeas Corpus, p. 4.) Petitioner and his parents had expended their combined life savings during trial. Without funds, Petitioner was unable to pay the large retainers required by private lawyers and was rejected by legal aid firms. (Reply to Response to Petition for Writ of Habeas Corpus, p. 3.)

The California Court of Appeal rejected respondent's

argument based on several cases cited by Petitioner. In In re Spears, 157 Cal.App.3d 1203, 1208 (1984), it was held,

> ...petitioner has adequately explained this delay as attributable to his lack of capacity to represent himself [cit.] and the scarcity of channels through which legal assistance is available to indigent prisoners...Accordingly, the petition is not barred by the doctrine of laches.

As set forth in Petitioner's reply in the Court below, it was not until instant counsel undertook his representation pro bono that investigation could begin. (Reply to Response to Petition for Writ of Habeas Corpus, p. 3.) The court below recognized that the constitutional magnitude of Petitioner's claim outweighed the People's concerns and addressed the merits. The Court of Appeal also rejected Respondent's claim of delay with regard to investigation and preparation of the Petition for Writ of Habeas Corpus and commended counsel and staff for their diligent work. (See Petition for Writ of Certiorari, p. a6, fn. 3.)

The People reiterate the argument made to the Court of Appeal; that trial counsel's medical condition was known to petitioner and that the Writ for Petition of Habeas Corpus

constitutes an abuse of the writ. That argument was soundly rejected by the Court of Appeal,

> The People contend that there is no excuse for delay since he has known Nemser was ill and suffered from brain seizures at least since the issue was first raised on appeal. While it is clear from the record DuFon knew at least since the time of appeal that Nemser had undergone surgery and was taking medication to ward off brain seizures during trial, DuFon claims he was unaware of the extent of Nemser's disability and its possible impact on the conduct of his case until present counsel obtained certain medical records in 1987. The record supports his contention.

(Petition for Writ of Certiorari, p. a4.) The People now claim,

> Here, it is absolutely clear that petitioner was aware that his trial counsel had been ill and suffered from brain seizures for the matter was even raised and litigated on the original direct state appeal.

(Response to Petition for Writ of Certiorari, p. 32.) That assertion is simply not accurate. Petitioner was unaware of the true nature of trial counsel's impairment. Petitioner knew that trial counsel had been ill and was taking medication.

Petitioner did not know about Mr. Nemser's aneurysms or the resultant serious psychological impairment until the fall of 1987. (Petition for Writ of Certiorari, p. a4.)

The People mistakenly cite McCowan v. Callahan, 726 F.2d 1, 10-11 (1st Cir. 1984), in support of their abuse of writ claim. (See Response to Petition for Writ of Certiorari, p. 32.) Petitioner pointed out in the lower court that the cited case ends on page 7. (Reply to Response to Petition for Writ of Habeas Corpus, p. 4.) The case respondent intended to rely on is McLaughlin v. Gabriel, 726 F.2d 7, 10-11 (1984), which addresses deliberate withholding of known information for purposes of a later proceeding. That is not the case here.[2]

Finally, the People urge that this Court deny the petition because of the prejudice which would result to their case. Petitioner relies on the authority cited by the People, Aiken v. Spalding, 684 F.2d 632 (9th Cir. 1982). That case holds that difficulty in reprosecuting may not bar the court's addressing a petition for habeas corpus relief,

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2. Also not on point are Thigpen v. Smith, 792 F.2d 1507 (11th Cir. 1986), and 28 U.S.C. Section 2254 which address procedural concerns of federal habeas corpus brought subsequent to denial of petitions brought in state courts.

> We have found no case which holds that difficulty in reprosecuting alone is a basis for denying an otherwise meritorious petition. Substantial delay in the filing of a petition has been held not to justify dismissal. [Cit.] It is the states ability to respond to the petition, not its ability to retry and convict the petitioner, that is relevant at the current stage of this litigation.

Id. at p. 634. The People have never been prejudiced in this case. Petitioner, through instant counsel, obtained the medical records independently. Trial counsel's medical condition is a matter attested to by his medical history, results of psychological testing and opinions of his treating physicians who prepared declarations attached to the Petition for Writ of Habeas Corpus. (Petition for Habeas Corpus, Exhibits A1-A16.) The People have the ability to respond to the issue before this Court; whether representation by a brain damaged attorney is a denial of the right to counsel.

IV.

CONCLUSION

The People have failed to directly address the issue of whether Petitioner was constructively denied counsel. The

analysis of the California Court of Appeal, cited by Respondent, is flawed. (Petition for Writ of Certiorari.) The opinion below stands in direct conflict with that of the 9th Circuit Court of Appeal decision in Javor v. United States, supra. That conflict requires resolution by this Court, for this case falls within a class narrow exceptions to the general rule requiring a specific showing of prejudice. This Court is now presented with an important question of federal law which has not been, but should be, settled.

DATED: September 18, 1989

Respectfully submitted,

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